

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| JOHN ROE, et al., | : | CASE NO. 3:15-cv-00111-TMR |
| | : | |
| Plaintiffs | : | Judge Hon. Thomas M. Rose |
| | : | |
| -vs- | : | |
| | : | |
| AMAZON.COM, et al., | : | |
| | : | |
| -and- | : | |
| | : | |
| SMASHWORDS, INC. | : | |
| c/o MARK COKER, STATUTORY AGENT | : | |
| 14402 OKA LANE | : | |
| LOS GATOS, CA 95032 | : | |
| | : | |
| Defendants | : | |

FIRST AMENDED COMPLAINT
FOR MONEY DAMAGES, AN ACCOUNTING AND EQUITABLE RELIEF
[JURY DEMAND ENDORSED HEREON]

Now come the Plaintiffs, by and through counsel, and for their Complaint against the Defendants aver as follows:

FIRST CLAIM

1. Plaintiffs are residents of Miami County, Ohio, are domiciled in Ohio and all events given rise to the claims for legal liability herein arise in this venue. The Plaintiffs' identities are not being disclosed as a matter of public record herein as their privacy interests substantially outweigh the presumption of open judicial proceedings. Plaintiffs will be filing

motions for protective orders herein to protect their privacy from further public disclosure in the context of what has been done to them by the Defendants already. The practice of proceeding under a pseudonym is well established in Ohio particularly when the actions of Defendants have already resulted in substantial damage to Plaintiffs and would result in more privacy violations and harassment by adding to the negative publicity already caused by the actions of the Defendants. Appropriate protective orders will allow the Defendants to conduct discovery, prepare a defense, if any, and know who their accusers are.

2. The Defendants, Amazon.com, Inc., Barnes & Noble, Inc. and Apple, Inc. (hereinafter, the “Corporate Defendants”), are all legal entities transacting business in the State of Ohio and/or have committed tortious acts in the State of Ohio against the Plaintiffs. The Defendant, Jane Doe, is an individual whose true identity is unknown to the Plaintiffs although she transacts business under the pseudonym, Lacey Noonan. This Court has personal jurisdiction over all Defendants.

3. The Defendant, Jane Doe, sometime on or before the calendar year 2014 wrote and caused to be published a book entitled *A Gronking to Remember*. The Corporate Defendants, offered the book for sale for in the State of Ohio on their respective websites. The book has and is being offered for sale in both digital formats (e.g. Nook, Kindle, iBooks) as well as in paperback.

4. The cover of the book contains a photograph of the Plaintiffs which was taken as part of their engagement journey leading toward their wedding. The photograph was appropriated by the Defendants for commercial gain without the permission of the Plaintiffs nor with the permission of any lawful copyright holder. The Plaintiffs were not compensated for the use of their image on the cover of these books. The Plaintiffs did not place the photograph on the internet for expropriation as the color photograph on the cover of these books.

5. The subject matter of the book, *A Gronking to Remember*, is less than tasteful and is offensive. The use of the Plaintiffs image has held them up to ridicule and embarrassment. This outrageous connection has been further aggravated when the book, with the Plaintiff’s image, has been reproduced in the media nationwide. The book has been shown as a source of ribald humor on *The Tonight Show* and *Jimmy Kimmel Live* as well as being displayed and read before the press at media day for the Super Bowl.

6. The photograph of the Plaintiffs contained on the cover of this book constitutes their *persona* to which the Plaintiffs own a right of publicity for commercial purposes. Plaintiffs never gave written or any other form of consent to the appropriation of their *persona*. The use of the Plaintiff’s *persona* by the Defendants for commercial purposes constitutes a violation of Chapter 2741 of the Ohio Revised Code.

7. As a result of Defendants’ wrongful appropriation of Plaintiffs’ *persona* for commercial purposes, the Plaintiffs are entitled to the recovery of actual damages, including

any profits derived from and attributable to such unauthorized use. In the alternative, the Plaintiffs are entitled to statutory damages in an amount of \$10,000.00.

8. In order to elect remedies as set forth in the preceding paragraph, the Plaintiffs are entitled to a full and complete accounting from each of the Defendants.

9. Plaintiffs are entitled to the recovery of punitive damages.

10. In addition, the Plaintiffs are entitled to the recovery of their attorney fees, courts costs and reasonable expenses associated with the pursuit of this civil action. The Defendants knew or should have known that they did not have the right to use the Plaintiffs' *persona* for commercial purposes entitling the Plaintiffs to the recovery of treble damages.

11. The Plaintiffs are also entitled to injunctive relief to stop the wrongful use of their *persona* resulting from the commercial activity of the Defendants both now and in the future. Plaintiffs are further entitled to an Order of Impoundment of all paperback versions of the book so they might be destroyed under the supervision of the Plaintiffs.

SECOND CLAIM

12. Plaintiffs re-allege as if fully re-written herein all allegations set forth hereinabove.

13. The acts of the Defendants constitute an invasion of privacy as that tort is recognized in the State of Ohio.

14. The invasion of the Plaintiffs' privacy was done with a reckless disregard for the rights and dignity of the Plaintiff.

15. As a proximate cause of the acts of the Defendants, the Plaintiffs are entitled to the recovery of compensatory damages, punitive damages and the recovery of their attorney fees.

THIRD CLAIM

16. Plaintiffs re-allege as if fully re-written herein all allegations set forth hereinabove.

17. The acts of the Defendants constitute a violation of Restatement 2d Torts 652 thereby entitling the Plaintiffs to the recovery of compensatory and punitive damages.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

1. Compensatory damages in an amount exceeding \$25,000 and/or for statutory damages of \$10,000;
2. A complete and exhaustive accounting from each Defendant of all monetary transactions arising from commercial activity wrongfully using the Plaintiffs' *persona*;
3. Punitive damages in an amount sufficient to deter each Defendant from engaging in this behavior in the future;
4. Recovery of all Plaintiffs attorney fees incurred on an hourly basis in the prosecution of this civil action, court costs and reasonable expenses associated with this civil action;
5. Treble damages;
6. Injunctive relief to stop the wrongful use of Plaintiffs' *persona* resulting from the commercial activity of the Defendants both now and in the future as well as an Order of Impoundment of all paperback versions of the book so they might be destroyed under the supervision of the Plaintiffs.

/s/ David E. Beitzel

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Attorney for Plaintiffs

JURY DEMAND

Now come the Plaintiffs and hereby demand a trial by jury for all issues herein so triable.

/s/ David E. Beitzel

David E. Beitzel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of July, 2015, the forgoing document was filed electronically with the Clerk of Court using CM/ECF system, and notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ David E. Beitzel

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Attorney for Plaintiffs